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# Supreme Court of the United States

October Term, 1957

No. 505

INSTITUTO CUBANO DE ESTABILIZACION DEL AZUCAR,

*Petitioner,*

vs.

T/V GOLDEN WEST; SKIBS A/S GOLDEN WEST,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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vs.

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*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Instituto Cubano De Estabilizacion Del Azucar prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit affirming a decree of the District Court for the Southern District of New York, in admiralty, dismissing petitioner's libel (a) for the specific performance of an agreement for arbitration and alternatively (b) to recover damages for respondent's short delivery of petitioner's cargo.

The opinion of the Court of Appeals, written by Judge Waterman with the concurrence of Judges Hincks and Lumbard, is as yet reported only in 1957 AMC 1481.* It appears at page 1a of the appendix to this petition. The opinion of Judge Bicks, in the District Court, is reported in 128 F. S. 754, and his memorandum on rehearing in 1956 AMC 704, 706. They appear on pages 8a-12a of the appendix hereto.

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* The first headnote is factually erroneous.

The opinion of the Court of Appeals is dated July 5, 1957, and the judgment was entered on that date (App. p. 17a).

This court's jurisdiction is invoked under 28 USC § 1254(1).

## The First Question Presented

By means of a voyage charterparty, a shipping company contracted with petitioner to transport the latter's cargo from Cuba to the United States on a vessel owned and operated by respondent. One provision of the charterparty was that disputes arising thereunder should be arbitrated (App. 14a). Upon receipt of the cargo, respondent issued and delivered to petitioner skeletal bills of lading which incorporated by reference all the terms of the charterparty (App. p. 15a).

The first and perhaps the only question is whether the arbitration clause of the adopted charterparty applies to petitioner's claim against respondent for its short delivery of the cargo.

In the view of the courts below, the provision for arbitration applied only to claims against the shipping company that executed the charterparty, and not to claims against respondent carrier, which agreed to perform and make applicable to itself all the terms whatsoever of the charterparty that the shipping company had negotiated.

## The Second Question, Conditionally Presented

If this court shall direct that petitioner's motion to compel arbitration be granted, no further question appears. Otherwise there is a second question, deserving of this court's consideration.

Where a shipping company contracted with petitioner for the transportation of a full cargo on a vessel owned and operated by respondent, and the latter received the

cargo and issued bills of lading therefor, reciting that all the terms of the shipping company's contract should apply to petitioner and respondent, are those bills of lading, while held by petitioner, without negotiation, subject to the provisions of the Carriage of Goods by Sea Act?

Contrary to the reasoned opinions of all the text writers who have expressed their views on the subject, the Court of Appeals, in this case of first impression, found "no merit whatever" in the notion that the Carriage of Goods by Sea Act is without application to those bills of lading.

## Statutes Involved

United States Arbitration Act, 61 Stat. 669; 9 U. S. C. §§ 2, 8; 68 Stat. 1233; 9 U. S. C. § 4; App. pages 16a-17a.

Harter Act, 27 Stat. 445; 46 U. S. C. § 190; App. page 17a.

Carriage of Goods by Sea Act, 49 Stat. 1207, 1208, 1211; 46 U. S. C. §§ 1300, 1301(a), (b), 1303(2), (6), 1305; App. pages 18a-20a.

## Statement

Under date of April 17, 1952, Transocean Shipping & Trading Corporation (not involved in this litigation) made a voyage charterparty with petitioner to transport a cargo of petitioner's molasses from Cuba to Albany, New York, on a tanker named the Golden West. The charterparty included the following provision:

> "26. Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any two of the three on any point or

> points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. * * * " (App. p. 14a).

The described tanker was not owned or operated by Transocean Shipping & Trading Company but by respondent, a Norwegian corporation, Skibs A/S Golden West.

Accordingly, when petitioner's cargo was laden on respondent's vessel, her master signed and delivered to petitioner skeletal bills of lading which recited:

> " * * * This shipment is carried under and pursuant to the terms of the Charter dated April 17th—1952 between Transocean Shipping & Trading Company and Instituto Cubano de Estabilizacion del Azucar, as Charterer, and all the terms whatsoever of the said Charter except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in the shipment." *

It is the critical fact in the case that *"the parties concerned in the shipment,"* the parties to whom all the terms of the shipping company's charterparty were made applicable, included by definition respondent itself as the owner and operator of the carrying vessel and as the primary, the responsible carrier of the cargo described in the bills of lading.

There is no question, and there was none in the courts below, that the master, who signed the bills of lading, was the employee and agent of respondent, and that his execution of the bills was the act of respondent, binding it to

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* Elsewhere in the bills of lading it was stipulated that the rate and payment of freight should be "as per Charter Party." (App. p. 15a.)

their performance (*The Themis*, 2 Cir., 275 F. 254, 262, per Hough, C. J.).

Claiming that its cargo had been short delivered, petitioner mailed to respondent in Norway a demand for arbitration. At the same time petitioner filed a libel in the Southern District of New York against respondent and its vessel, alleging that respondent had undertaken to transport petitioner's cargo by the above-mentioned charterparty, which contained a provision for arbitration. The libel sought a writ of foreign attachment and an order compelling respondent to proceed with the arbitration (9 USC § 8; *The Anaconda et al.* v. *American Sugar Refining Company*, 322 U. S. 42).

Although the libel was not filed until December 8, 1953, and the vessel had discharged at destination more than a year earlier, on May 22, 1952, the lapse of time did not, in any aspect of the case, affect petitioner's right to arbitration (*Son Shipping Co., Inc.* v. *DeFosse & Tanghe et al.*, 2 CA, 199 F. 2d 687). There was no question on that point in the courts below.

On December 22, 1954, when one of its vessels became subject to attachment in this country, respondent appeared and posted security. Petitioner thereupon moved to compel arbitration in accordance with the prayer of the libel. The motion was heard by Judge Bicks.

Not disputing its alleged ownership and operation of the carrying vessel or the authenticity of the bills of lading, respondent denied ever having "entered into any charter agreement" either with petitioner or with Transocean Shipping & Trading Company, and asserted that the transportation in controversy took place while the vessel was being operated by respondent under a long-term time charterparty with Overseas Commodex Corporation, giving the latter the use of the vessel's full capacity and providing that her master should sign bills of lading as the time charterer might direct. (App. p. 9a.)

In that connection the law is clear that a time charterparty, such as respondent professed to have entered into with Overseas Commodex Corporation, is not a demise of the vessel and does not in anywise lessen the agency of the master for the general owner (*Reed* v. *United States*, 78 U. S. 591, 601; *United States* v. *Shea*, 152 U. S. 178, 187), who, as the actual carrier, is bound by the bills of lading signed either by the master or by the time charterer, exactly as if they had been executed by the general owner directly (*The Themis, supra*, 2 Cir., 275 F. 254, 262, Hough, C. J.; cf. Gilmore & Black, *The Law of Admiralty* [1957], ch. IV, pp. 170-173).

Respondent did not contend otherwise, but drew a distinction, which Judge Bicks considered decisive, between petitioner's allegation "that respondent undertook to transport libelant's cargo by a charterparty dated April 17, 1952," and the proof that respondent's undertaking was evidenced by bills of lading which incorporated all the terms of that charterparty.

In the alleged case, where an arbitration clause is contained in a charterparty executed by the shipowner, the provision for arbitration indubitably applies between the shipowner and the holder of a bill of lading in which the charterparty is incorporated by reference. So much was decided in *Son Shipping Co., Inc.* v. *DeFosse & Tanghe et al., supra*, 2 CA, 199 F. 2d 687.

On the other hand, respondent argued, in a case like this, where the arbitration clause is contained in a charterparty executed by a shipping company, to which respondent professed to be a stranger, the provision for arbitration does not apply to the shipowner [who alone could perform the shipping company's charterparty, and whose bills of lading incorporated by reference all the terms of the shipping company's charterparty with the shipper, and provided that those terms should apply to the shipowner and the shipper].

In such a case, respondent contended and Judge Bicks agreed, the provision for arbitration remains personal to the shipping company.

Indeed, Judge Bicks not only accepted the distinction respondent had drawn between the two cases, but made the notable observation that in the second case, this one, the shipowner might be ignorant of the terms of the incorporated charterparty "except through the reference in the bills of lading." (App. p. 10a.)

Petitioner moved for a reargument, urging the clarity of the law under which respondent was bound by its master's bills of lading, and pointing out that neither the asserted time charterparty between respondent and Overseas Commodex Corporation, nor the asserted lack of privity between respondent and the shipping company, was of any significance. Whether the shipping company was respondent's alter ego or its secret agent, or was an assignee of Overseas Commodex Corporation, or was a subcharterer from that corporation, or was a presumptuous volunteer, made no difference whatever.

The controlling fact was that the master's bills of lading, incorporating the shipping company's charterparty with petitioner, were, as a matter of law, the contracts of respondent with petitioner.

Granting reargument but adhering to his former decision, Judge Bicks emphasized his recognition of the master's authority in the premises and repeated that his decision was based on the grounds (a) that the bills of lading did not incorporate a charter to which respondent was a party [which may be allowed], and (b) that the incorporated charter did not bind respondent to arbitrate with petitioner [which is the point at issue]. (App. p. 11a.)

At the same time Judge Bicks denied petitioner's motion for leave to inspect the time charterparty that respondent

claimed to have made with Overseas Commodex Corporation (App. p. 12a). If the existence or any contents of the asserted time charterparty were deemed to be material, petitioner should not have been denied sight of it. As a matter of law, however, the time charterparty was immaterial, notwithstanding that its assumed provisions were conspicuously mentioned by the courts below. (Unless it contains, as it may, a stipulation that all subcharters and bills of lading should include a provision for the arbitration of cargo owners' claims against respondent, the time charterparty would probably do no more than confirm what is otherwise obvious, that as owner and operator of the vessel respondent exclusively was capable of performing the shipping company's contract.)

No appeal lay from the order denying arbitration (*Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176).

Petitioner obtained leave to amend its libel so as to make clear that the charterparty incorporated in respondent's bills of lading was not executed by respondent but by the shipping company for performance by respondent.

Respondent's motion for the summary dismissal of the libel, which included a prayer for general relief, was denied by Judge Bicks, without passing on the question whether, as a suit to recover damages for injury to cargo, rather than an application to compel arbitration (already denied), the action was time barred (App. p. 12a).

Thereafter respondent filed exceptions and exceptive allegations, contending that in the light of Judge Bicks' decision petitioner's cause of action could not be predicated on the charterparty incorporated in respondent's bills of lading but must rest on the bills of lading signed by the master as respondent's agent. Hence, respondent urged, the Carriage of Goods by Sea Act applied (of its own force) to the bills of lading, and a suit thereon was barred because not commenced within one year [46 USC § 1303(6)].

Petitioner countered that since petitioner's charterparty with the shipping company was for the transportation of a full cargo in respondent's vessel, the contract was one of private carriage, to which the Carriage of Goods by Sea Act is inapplicable (46 U. S. C. § 1305), and that since the bills of lading were essentially an agreement by respondent to perform the charterparty which the shipping company had made for respondent's performance, the bills of lading have the same status under the Carriage of Goods by Sea Act that they have under the Harter Act (46 U. S. C. § 190); that is, despite their label, they are not commercial bills of lading or shipping documents, so long as they are held by the shipper and not negotiated, but are no more than receipts for the cargo contracted to be carried under the charterparty.

The libel was dismissed, without opinion, by Judge Thomas F. Murphy, and on petitioner's appeal from the final judgment, including an appeal from the order denying arbitration, the judgment was affirmed in both respects (App. p. 1a).

## Reasons for Allowance of Writ

### I.

**1. The denial of arbitration in the circumstance of this case is irreconcilable with the applicable decisions of this court.**

In cases not involving arbitration, this court has repeatedly held litigants to be bound by the provisions that they incorporated by reference from a contract one of them had theretofore made with a third person (*Woodruff et al.* v. *Hough et al.*, 91 U. S. 596, 602; *Guerini Stone Co.* v. *Carlin*, 240 U. S. 264, 277; cf. Rest., *Contracts*, § 228).

Since the enactment of the United States Arbitration Act, this court has made plain that, as Congress intended

(68 Cong., 1st Sess., H. R. Rep. No. 96), a provision for arbitration in a contract governed by that Act now stands on the same footing as any other contract provision (*The Anaconda et al.* v. *American Sugar Refining Co., supra,* 322 U. S. 42, 44).

In *Marine Transit Corporation* v. *Dreyfus,* 284 U. S. 263, this court sustained the constitutionality of the Act in a case where the provision for arbitration was contained in a form of contract adopted only by reference. Mr. Chief Justice Hughes, writing for this court, made no distinction between the contract executed by the parties and the form of contract they had adopted by reference (284 U. S. 263, 270). The New York arbitration statute (CPA §1448), enacted earlier, had then been interpreted to mean that an arbitration clause contained in a form of contract adopted by reference becomes an integral part of the contract between the parties (*In re Hines,* 222 N. Y. App. Div. 543). This court's decision in the *Marine Transit* case, as well as the comparable decisions of the New York courts, led the Circuit Court of Appeals for the Ninth Circuit to interpret the similar California arbitration statute (Code Civ. Proc. Cal. §1280) in the same way (*Western Vegetable Oils Co., Inc.* v. *Southern Cotton Oil Co. et al.,* 141 F. 2d 235, 237).

Any attempted distinction between this case and the *Marine Transit* case (284 U. S. 263) must derive from the fact that in the latter case the parties subjected their agreement to an empty, unsigned form of contract, in which an arbitration clause was contained, whereas in this case they expressly adopted and made applicable to themselves all the terms of a specific contract, also containing an arbitration clause, which one of them had entered into with a third person. To attach legal significance to that difference, and to say that in the first case the parties agreed to arbitrate and in the other they did not, is to disregard the first two of the three cited lines of this court's decisions.

**2. In holding that the arbitration provision does not apply to respondent, the Court of Appeals has so far departed from accepted principles of law as to warrant this court's intervention to prevent the impairment of many outstanding contracts.**

Substantially, the Court of Appeals held that the incorporation of the shipping company's contract into respondent's bills of lading was a meaningless exercise. This despite the fact that, by those bills of lading, respondent:

(a) Adopted the contract the shipping company had made for respondent's performance;

(b) Accepted the promised fruits of that contract as the price of performing it, and

(c) Agreed that *"all the terms whatsoever"* of that contract should apply to petitioner and respondent, they being the most concerned of all *"of the parties concerned in the shipment."* (App. p. 15a.)

Respondent's covenant so made with petitioner was held to be no more than an impertinent admonition that petitioner must look to the shipping company and not to respondent for the performance of the undertaking that all disputes arising under the adopted contract should be put to arbitration.

It was of no moment that the intended disputes have been held to include "any growing out of the maritime venture initiated by the charterparty." (*In re Canadian Gulf Line, Limited*, 2 Cir., 98 F. 2d 711, 714.)

It made no difference that a mere delegate of the shipping company, agreeing to perform the contract, would be bound as the shipping company was bound, or that in jurisdictions where provisions for arbitration are enforcible, as in New York, a simple assignment from the shipping company to respondent, without any promise from the latter to petitioner, would bind respondent to all the

terms of the contract, including the provision for arbitration (Rest., Contracts, § 160, N. Y. Ann.; *Matter of Lowenthal,* 199 App. Div. 39, affirmed 233 N. Y. 621; *Matter of Lipman,* 289 N. Y. 76 at 81; cf. Rest., Contracts, § 164; Rest. Agency, § 104; Williston on Contracts, Rev. Ed., § 418, 418-A).

Respondent, according to the Court of Appeals, remained uncommitted to arbitrate with petitioner. (App. pp. 4a-5a.)

Unless the decision stands only for the proposition that an arbitration provision is ineffectual when incorporated by reference from another contract, the decision means either that all provisions so incorporated are ineffectual or that all provisions so incorporated are ineffectual when that result is required to knock out an included provision for arbitration.

No matter which way the decision may be understood, it has gravely disturbing effects. The convenient and hitherto unquestioned practice of incorporating by reference the terms of one contract into another, attended by a stipulation that those terms shall apply between the parties so adopting them, is invalidated in whole or in part (*cf.* Rest., Contracts, § 228). At least that practice may not prudently be followed henceforth in any case where the subject of the contract is within the scope of the United States Arbitration Act, certainly not if the provisions incorporated by reference include a provision for arbitration. Beyond that result the decision below rejects the principle of law, affirmed by the authorities last above cited, that one who assumes and agrees, either expresaly as here, or even by implication, to perform the duties originally undertaken by another is bound to the promisee in the same way that the original promisor is bound.

Pending the accommodation of prospective transactions to the decision in this case, its effect on many outstanding contracts is destructive.

**3. In addition to curtailing the intended application of the United States Arbitration Act, contrary to the pertinent decisions of this court, and besides impairing the obligation of many outstanding contracts, the decision below is important because it vexes the future administration of state arbitration laws in both the state and the Federal courts.**

No court subject to the authority of this decision may hereafter enforce between the parties to a maritime contract (or perhaps any other contract governed by the Federal Act) an arbitration provision contained in a contract between one of those parties and a third person where the last-mentioned contract has been wholly adopted by reference and the immediate promisor has assumed all the obligations of the original promisor, for the same consideration, and has agreed that all the terms of the adopted contract shall apply to himself and the promisee. The opinion here cannot be read more narrowly (App. pp. 4a-5a).

As already mentioned, state arbitration statutes substantially in the words of § 2 of the United States Arbitration Act, such as the predecessor of that Act, now § 1448 of the New York Civil Practice Act, and such as § 1280 of the California Code of Civil Procedure, have been distinctly construed to mean that the contracting parties have agreed to arbitrate between themselves when they have incorporated by reference in their contract the provisions of an extrinsic document containing an arbitration clause.

Until state courts shall abandon the principles of law by which the integration of contracts has been determined heretofore, principles which this court considered unquestioned in the *Marine Transit* case (284 U. S. at 270) and which have been followed in the application of the New York and California arbitration statutes, both Federal and

state courts will be perplexed with several serious problems so long as the present decision stands.

In cases where jurisdiction rests only on diversity, local arbitration statutes must be applied by the Federal courts (*Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U. S. 198, 203).

Henceforth a Federal court, sitting, for example, in New York, will be required to hold that a contract involving a local matter but otherwise indistinguishable from the present contract, constitutes an enforcible arbitration agreement under C. P. A. § 1448. In perhaps the next case, or possibly in the same case, the same court will be obliged to hold that in virtue of this decision the same contract does not constitute an arbitration agreement with respect to an included transaction within the scope of the Federal Act.

It may not be overlooked that the provision here, a common form (*e.g.*, *Son Shipping Co., Inc.* v. *DeFosse & Tanghe et al., supra*, 2 C. A., 199 F. 2d 687, 688), is for "arbitration in New York City pursuant to the laws relating to arbitration there in force * * *". Both the state arbitration statute (C. P. A. § 1448) and the Federal Act answer that description.

The question is unavoidable whether the state courts may enforce an agreement for arbitration that the Federal courts (at least in the states of Vermont, Connecticut and New York) are precluded from enforcing by the authority of the present decision (*cf. Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109).

The Appellate Division of the New York Supreme Court recently restrained the prosecution of a state court action on a contract which contained a provision for arbitration in New York and which involved a transaction deemed probably to be within the scope of the United States Arbi-

tration Act. The court expressly reserved the question whether it would enforce arbitration in the event that the Federal court should refuse to take jurisdiction either on the ground that the contract was non-maritime or that, as a contract affecting commerce, the controversy involved less than the jurisdictional amount required in a diversity case. (*Parsons & Whittemore, Inc.* v. *Rederiaktiebolaget Nordstjernan*, 286 App. Div. 553, 556.)

It is plainly unfortunate that comparable provisions of the United States Arbitration Act and the New York arbitration statute should have different applications in substantially the same circumstances. The confusion introduced by the present decision is apparent.

## II.

**In holding, for the first judicial decision on the point, that the Carriage of Goods by Sea Act is applicable to bills of lading issued by a private carrier to the contracting shipper, the Court of Appeals has construed the Act in a manner inconsistent with its evident purpose and contrary to the construction placed upon it by leading commentators on the law of charter-parties and bills of lading.**

This point disappears from the case in the event that arbitration be directed. Even in a case governed by the provisions of the Carriage of Goods by Sea Act, the right to arbitration is not affected by the Act and may be enforced after the one-year period when a suit to recover for the loss could be maintained, provided only that arbitration be demanded within a reasonable time (*Son Shipping Co., Inc.* v. *DeFosse & Tanghe et al., supra*, 2 C. A., 199 F. 2d 687). The courts below treated petitioner's demand as having been made within a reasonable time,

but as having been made against the wrong carrier. Treating the application as a suit against the right carrier, the courts below held it to be governed by the Carriage of Goods by Sea Act and barred by the one-year limitation provision contained in that Act (46 U. S. C. § 1303(6), App. p. 18a).

A charterparty or other transportation arrangement under which the shipper takes the full capacity of a vessel, large or small, is a contract of private carriage (*Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104, 108), the terms of which the shipper and the carrier may fix to suit themselves, their bargaining powers presumably being equal.

Bills of lading issued by a private carrier to the contracting shipper do not affect, as between them, their contract of private carriage, and the Harter Act has no application to such bills of lading so long as they remain in the hands of the contracting shipper. The rights of the immediate parties continue to be governed by their contract of private carriage and not by bills of lading issued thereunder to the shipper (*Flat Top Fuel Co.* v. *Martin*, 2 Cir., 85 F. 2d 39; *The Fri*, 2 Cir., 154 F. 333; *The G. R. Crowe*, 2 Cir., 294 F. 506; *Romano et al.* v. *West India Fruit & S. S. Co.*, 5 Cir., 151 F. 2d 727, 730). This despite the fact that the Harter Act is literally applicable to every "bill of lading or shipping document" in ocean trade to or from a United States port (46 U. S. C. § 190; App. p. 17a).

The Carriage of Goods by Sea Act is inapplicable to charterparties (46 U. S. C. § 1305; App. pp. 19a-20a), and is applicable to a bill of lading issued under a charterparty *only* from the time when such bill of lading "regulates the relations between a carrier and a holder of the same" (46 U. S. C. § 1300, 1301(b); App. p. 18a).

Upon the foregoing considerations the commentators who have touched on the subject are unanimous in concluding that the Carriage of Goods by Sea Act has no application, any more than the Harter Act has, to bills of

lading issued by a private carrier to the contracting shipper so long as they remain in the latter's hands (*Knauth, Ocean Bills of Lading*, 4th ed. [1953], p. 178; *Poor on Charterparties and Ocean Bills of Lading*, 4th ed. [1954], § 62, p. 147; *Scrutton on Charterparties*, 16th ed. [1955], pp. 468-469; Gilmore & Black, *The Law of Admiralty* [1957], pp. 192-195).

Respondent's bills of lading provided in substance that the terms of the contract of private carriage negotiated by the shipping company with petitioner should apply to respondent and petitioner. Petitioner remained the shipper of the entire cargo, and the character of the transportation contract as one for private carriage was in no way changed by respondent's assumption of it. The situation was exactly as if respondent instead of the shipping company, or together with the shipping company, had executed the contract in the first place. The agreement evidenced by respondent's bills of lading that the terms of that contract should apply to and govern the rights of respondent and petitioner was valid as between them, so that their relations were in fact governed by the contract of private carriage. The bills of lading, issued by the private carrier to the contracting shipper, were outside the compass of the Carriage of Goods by Sea Act, because, by lawful agreement, they were not bills of lading which regulated the relations between the carrier and the holder (46 U. S. C. § 1301(b), § 1305; App. pp. 18a-20a).

## CONCLUSION

**It is respectfully submitted that the questions presented are of major importance. The consequences of the decision below extend far beyond this immediate litigation, and the case deserves and in justice requires the attention of this honorable court.**

September 25, 1957.

JOHN C. CRAWLEY,
*Counsel for Petitioner.*

# APPENDIX

## Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 193—October Term, 1956

(Argued February 11, 1957 Decided July 5, 1957)

Docket No. 24267

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INSTITUTO CUBANO DE ESTABILIZACION DEL AZUCAR,
*Libelant-Appellant,*

v.

T/V GOLDEN WEST; SKIBS A/S GOLDEN WEST,
*Respondent-Appellee.*

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Before:

HINCKS, LUMBARD and WATERMAN,
*Circuit Judges*

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Libelant appeals from an order of U. S. District Court for Southern District of New York, Murphy, *J.*, dismissing its libel brought against the T/V *Golden West* and her owner to recover damages for short delivery of libelant's cargo. An interlocutory order by Bicks, *J.*, denying libelant's motion to compel respondent to proceed with arbitration is also included in the appeal. The orders below are affirmed.

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THACHER, PROFFITT, PRIZER, CRAWLEY & WOOD (JOHN C. CRAWLEY, JOHN J. LEIBELL, Advocates), New York City, *Proctors for Appellant.*

*Opinion of United States Court of Appeals*

PYNE, BRUSH, SMITH & MICHELSEN (DUDLEY C. SMITH, Advocate), New York City, *Proctors for Appellee.*

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WATERMAN, *Circuit Judge:*

On May 14, 1952 and May 16, 1952 the appellant delivered to the master of the T/V *Golden West* at two Cuban ports shipments of blackstrap molasses for which the master issued three bills of lading, signed by him, acknowledging receipt of the shipments to be delivered at Albany, New York. Each bill of lading contained the following:

> "This shipment is carried under and pursuant to the terms of the Charter dated *April 17th—1952* at between *Transocean Shipping & Trading Company* and *Instituto Cubano de Estabilizacion del Azucar,* as Charterer, and all the terms whatsoever of the said Charter except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in the shipment."

(italics denote typewritten inserts into blanks on printed Bill of Lading form). Paragraph 26 of the charter-party of April 17, 1952, contained provisions for arbitration between the parties of "Any and all differences and disputes of whatsoever nature arising out of this Charter. • • • " and provided that "Either party hereto may call for such arbitration by service upon any officer of the other. • • • "

On December 8, 1953, appellant filed its libel against the T/V *Golden West* and the respondent corporation, Skibs A/S Golden West, the owner of the T/V *Golden West* during May, 1952, alleging therein that upon discharge of the molasses at Albany on May 22, 1952, the shipments were approximately 300,107 lbs. short, to the damage of the libel-

ant approximately $4,505.78, payment of which had been demanded and refused, and praying for an order compelling respondent to post security for the claim and to proceed to arbitrate.

As stated in the bills of lading, the libelant-appellant entered into a Charter party on April 17, 1952, with one Transocean Shipping & Trading Company, which Charter party contained provisions for arbitration. On the day libelant filed its libel, December 8, 1953, it also served its notice to arbitrate upon respondent at Oslo, naming its arbitrator. Respondent ignored both the libel and demand for arbitration until late in 1954 when security was posted, and appearance in defense of the libel was filed on December 22, 1954. Respondent continued to ignore libelant's request that it appoint an arbitrator.

The petition seeking that respondent be compelled to arbitrate was heard below and the Court found that at no time had the libelant and respondent entered into any Charter party for the hire of the T/V *Golden West;* that the vessel on May 29, 1949, had been chartered by Skibs A/S Golden West to one Overseas Commodex Corporation for three years and that this charter had been renewed on May 16, 1951, for a further period of three years and one and one-half months; and that under the terms of this Charter party the whole capacity of the *Golden West* was chartered to Overseas Commodex and the master of the vessel was to sign bills of lading as Overseas Commodex directed.

It also appeared that under an arrangement with the long-term charterer, Overseas, Transocean Shipping and Trading Company was a time-charterer of the vessel when, on April 17, 1952, the vessel was hired from Transocean by the libelant.

From these facts it is obvious that the respondent corporation never agreed to arbitrate any dispute of any kind

with this libelant. It is equally obvious that the master of the T/V *Golden West* accepted the molasses, issued bills of lading therefor, and carried the cargo, all pursuant to the terms of a charter party between the libelant and Transocean Shipping & Trading Company, to which charter this respondent was not a party; but when the master signed the bills of lading the vessel owner became liable *in personam*, and the vessel liable *in rem*, in the event there should be any failure in the performance of the contract of carriage the bills of lading evidences. Cf. *The Schooner Freeman, etc.* v. *Buckingham et al.*, 59 U. S. (18 How.) 182, at 190 (1855); *The Alert*, 61 F. 113 (2 Cir. 1895); *The Themis*, 275 F. 254 (2 Cir. 1921); The Carriage of Goods By Sea Act, 46 U. S. C. A. §§ 1300-1315, particularly § 1301(a), § 1301(b), § 1303(2).

These three bills of lading evidenced contracts of carriage that included the content of the Charter between libelant and Transocean, one of the provisions of which was that disputes between libelant and Transocean could be arbitrated if either party called for it and served a demand therefor upon the other. By serving its demand for arbitration not upon Transocean but upon respondent, and by filing its libel not against Transocean but against respondent to compel such arbitration, libelant sought to substitute Skibs A/S Golden West for Transocean. Libelant's position apparently was that since it could sue Skibs A/S Golden West (unless libelant's claims be time-barred) and Skibs A/S Golden West would be liable to pay any recovery libelant might obtain for failure to perform the contract of carriage, Skibs A/S Golden West could be considered substituted for Transocean as a party to an arbitration proceeding the purpose of which would be to inquire into the same subject-matter.

The district judge denied the motion to compel Skibs A/S Golden West to proceed with arbitration. He held that

such a substitution was unwarranted; for, although the bills of lading issued by the owner's master may have made the owner liable to the shipper for any shortage in the shipment upon delivery, the owner was not a party to any Charter incorporated in the bills of lading that provided for submission of shortage claims to arbitration. We affirm.

If the libelant desired to submit its claims of shortage to arbitration, it should have served its demand upon Transocean, with whom it had its arbitration agreement. The charter party incorporated into the contract for carriage evidenced by the bills of lading so provided and cannot be reasonably read to provide otherwise. We point out that the charter party incorporated into the contracts for carriage evidenced by the bills of lading issued to the shipper by the master of the *Norita* that were in suit in *Son Shipping Co., Inc.* v. *DeFosse & Tanghe et al.*, 199 F. 2d 687 (2 Cir. 1952), was a charter party the owner of the *Norita* had executed, and by which the *owner* had expressly agreed that disputes with the owner were arbitrable. Our decision here is not inconsistent with the holding there.

An order to compel arbitration having been denied to libelant, libelant then, despite the fact that its pleading showed on its face that the claim was time-barred,[1] sought recovery from respondent for failure to properly perform its contract for carriage. Respondent filed exceptions alleging the time-bar. The District Judge sustained the exceptions and dismissed the libel. We affirm this order. Libelant sought to avoid 46 U. S. C. A. § 1303(6) by main-

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[1] The Carriage of Goods by Sea Act, U. S. Code Title 46, Section 1303(6) provides:

* * *

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: * * *"

taining that the charter between it and Transocean by which the whole capacity of the vessel was contracted for was a contract of private carriage rather than a contract of common carriage, and that recovery for a breach of that contract was not subject to the provisions of the Carriage of Goods by Sea Act. We see no merit whatever to this contention. As we have pointed out above, the only rights libelant may ever have had against this respondent are based upon the bills of lading. The Carriage of Goods by Sea Act controls the effect of "*every* bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foregin trade," 46 U. S. C. A. § 1300. (Emphasis added.)

The orders appealed from are affirmed.

## Judgment

### UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of July one thousand nine hundred and fifty-seven.

Present:

HON. CARROLL C. HINCKS,
" J. EDWARD LUMBARD,
" STERRY R. WATERMAN,
*Circuit Judges.*

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[SAME TITLE]

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Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

## Judge Bicks' Memorandum Denying Arbitration

(Record, pages 26-28)

BICKS, D. J.:

Libelant instituted a proceeding under Section 8 of the United States Arbitration Act, 9 U. S. C. § 8, to compel respondent to proceed with arbitration. It does not appear that the respondent has filed any answer or exceptions to the libel. Libelant, invoking the provisions of Section 4 of the Act,[1] now moves for like relief.

The libel alleges that (i) by a charter party dated April 17, 1952 respondent undertook to transport for the libelant blackstrap molasses aboard the T/V Golden West; (ii) on May 14 and May 16, 1952, libelant delivered to respondent as cargo aboard the said vessel a quantity of blackstrap molasses; (iii) upon discharge of said cargo there was a shortage of approximately 300,000 pounds; and (iv) that the charter party provided for arbitration of disputes arising thereunder. The Court is then asked to direct that the matter in controversy be arbitrated in accordance therewith.

Although the libel alleges that respondent undertook to transport libelant's cargo by a charter party dated April 17, 1952, such apparently is not the fact. The papers submitted on the motion disclose that the T/V Golden West was chartered by the respondent owner to Overseas Com-

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[1] 9 U. S. C. §4 in pertinent part provides:

"A party aggrieved by the alleged failure * * * to arbitrate under a written agreement for arbitration may petition any Court of the United States * * * for an order directing that such arbitration proceed in the manner provided for in such agreement * * *."

modex Corp. on May 24, 1949 and that said charter was renewed on May 16, 1951 for a period of three years one and a half months. Under the terms thereof the whole capacity of the vessel was chartered to Overseas Commodex Corp. and the master was to sign bills of lading as directed by the charterer. On April 17, 1952, while the vessel was still under long-term charter to Overseas Commodex Corp., libelant entered into a charter party for hire of the vessel, with Transocean Shipping & Trading Company, as time chartered owner. (The relationship between Overseas Commodex and Transocean Shipping does not appear and is not here material.) Respondent at no time entered into any charter party with the libelant for the hire of the T/V Golden West. In May 1952 the master signed three bills of lading covering the cargo in suit which provided, inter alia:

> "This shipment is carried under and pursuant to the terms of the Charter dated April 17th, 1952 * * * between Transocean Shipping & Trading Company and Instituto Cubano de Establizacion del Azucar, as Charterer, and all the terms whatsoever of the said Charter except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in the shipment."

The bills of lading do not contain an arbitration clause; the charter referred to in the bills of lading, however, does.

It is clear that the libel is drawn upon the theory that the charter party referred to in the libel constituted the contract of carriage. The motion papers, however, reveal that the charter of April 17, 1952 was in fact a sub-charter between a time charterer only and the libelant, to which the respondent owner was not a party, and that the libelant was the holder of bills of lading issued by the master. Apparently on this motion libelant is proceeding on the

theory that the contract of carriage consists of the bill of lading and the incorporated charter. It is unnecessary for our purpose to consider whether under the circumstances of this case, the bill of lading is merely a receipt and not a contract of carriage. (See e.g., Poor on Charter Parties and Ocean Bills of Lading, Third Edition, Section 105 and cases cited therein.)

The issue presented on this motion is whether the respondent ever agreed with libelant to arbitrate the claim in controversy. In support of its position that the respondent did so agree libelant relies solely upon the bills of lading and cites *Son Shipping Co.* v. *De Fosse & Tanghe*, 2nd Cir., 1952, 199 F. (2d) 687, and *Southwestern Sugar and Molasses Co.* v. *The Eliza Jane Nicholson* (S. D. N. Y., 1954), 126 F. Supp. 666. In *Son Shipping Co.* v. *De Fosse & Tanghe*, supra, charterer sought arbitration with the owner of a vessel pursuant to the terms of a charter party incorporated into bills of lading issued by the master. The Court of Appeals, finding it unnecessary to make any distinction between the charter party and the bills of lading, held that the owner was bound by its agreement to arbitrate disputes with the charterer. That case is not authority for libelant's position. There the owner had agreed *in the charter party incorporated in the bill of lading* to arbitrate all disputes arising therefrom; here the owner was not a party to the charter agreement referred to in the bills of lading and indeed may well have been in complete ignorance thereof except through the reference in the bills of lading.

*Southwestern Sugar and Molasses Co.* v. *The Eliza Jane Nicholson*, supra, is inapposite, the Court having found that there was no incorporation of the terms of any charter party in the bill of lading.

Libelant would in effect have the court either construe the reference in the bill of lading to the charter between

it and Transocean Shipping & Trading Company as a reference to the charter between the respondent and the primary charterer, or deem the respondent a party to the sub-charter because the master issued a bill of lading making reference thereto. Neither of said alternatives is warranted.

Motion to compel arbitration denied.

Dated: March 2, 1955.

ALEXANDER BICKS,
*United States District Judge.*

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## Judge Bicks' Memorandum Denying on Reargument Libelant's Motions for Arbitration and for Discovery

(Record, page 42)

BICKS, D. J.:

Motion for reargument granted and upon such reargument the former decision is adhered to. The suggestion that the motion appears to have been denied because the Court overlooked the legal status of the master of a chartered vessel and his traditional power to bind the ship owner reflects a misreading of the opinion of the Court. Libelant persists in refusing to recognize that the bill of lading issued by the master did not incorporate the charter to which the ship owner was a party and that the charter which *was* incorporated does not bind the ship owner to arbitrate libelant's claim for cargo damage.

*Judge Bicks' Memorandum Granting Libelant's Motion to Amend the Libel*

In the same notice of motion libelant also seeks to procure discovery and inspection of charters to which it was not a party. Rule 34 of the Federal Rules of Civil Procedure requires a showing of good cause to entitle a party to a discovery and production of documents. Libelant has failed to make such a showing and this branch of the motion, therefore, is denied.

Settle order.

Dated: May 11, 1955.

ALEXANDER BICKS,
*U. S. D. J.*

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## Judge Bicks' Memorandum Granting Libelant's Motion to Amend the Libel

(Record, page 43)

BICKS, D. J.:

Motion to amend the libel granted. The prayer thereof seeks "such other and further relief as may be just". Under the circumstances of this case such clause is sufficient to sustain the libel as one for cargo loss and damage. *Southwestern Sugar and Molasses Co.* v. *The Eliza Jane Nicholson*, S. D. N. Y. 1954, 126 F. Supp. 666. In so holding, the Court does not, of course, pass upon whether or not the claim is time-barred or whether any other defense upon the merits exists.

Dated: May 11, 1955.

ALEXANDER BICKS,
*U. S. D. J.*

## Judge Bicks' Order Denying Libelant's Motions for Arbitration and Discovery

(Record, pages 56-57)

The libellant having filed a libel in this Court wherein and whereby it prayed that the Court direct that the dispute alleged in the libel be arbitrated, and respondent Skibs A/S Golden West having appeared, and libellant having moved this Court by notice dated January 14, 1955 for an order under Section 4 of the United States Arbitration Act, 9 U. S. C. Sec. 1 et seq., compelling respondent Skibs A/S Golden West to submit to arbitration, and the motion having duly come on to be heard, and the Court after due deliberation having been had thereon, and upon filing the opinion of the Court dated March 2, 1955, having denied said motion; and libellant by Notice of Motion, undated and served on proctors for respondent March 16, 1955, for leave of the Court for reargument of the said motion, and further for an order of discovery and inspection of the various items set forth in said Notice of Motion, and the motion having duly come on to be heard and having been respectfully referred to the Honorable Alexander Bicks, now upon reading and filing Notice of Motion, undated and served on proctors for respondent March 16, 1955, and the memorandum in support thereof attached to said Notice of Motion, and the affidavit of Dudley C. Smith dated March 24th, 1955 in opposition to said motion for reargument and said motion for discovery and inspection, it is

ORDERED that the libellant's motion for reargument is granted and upon such reargument the original decision of the Court dated March 2, 1955 is adhered to; and it is further

ORDERED that libellant's motion for discovery and inspection is in all respects denied.

ALEXANDER BICKS,
*U. S. D. J.*

Dated: New York, N. Y.
June 22, 1955.

## Arbitration Clause (R. 4).

"26.—Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the dispute or differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person, with authority the same force and effect, as if said second arbitrator had been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either arbitrator may apply to a Judge of any court of maritime jurisdiction in the city above mentioned for the appointment of a third arbitrator, and the appointment of such arbitrator by such Judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators. Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this Charter for hearing and determination. Awards made in pursuance to this Clause may include costs, including a reasonable allowance for attorney's fees, and judgment may be entered upon any award made hereunder in any Court having jurisdiction in the premises."

## Bill of Lading (R. 87).

Shipped in apparent good order and condition by Old Time Molasses Company, as Agents for Instituto Cubano de Estabilizacion del Azucar on board the Norwegian Steamship "Golden West" whereof Kristoffer Saeboe is Master at the port of Vita, Gibara, Cuba, 4,166-653 long tons.—Equal to 9,333,900 lbs.—Said to be 764,340 gallons of blackstrap molasses 1952 crop to be delivered at the port of Albany, New York, or so near thereto as the Vessel can safely get, always afloat, unto Instituto Cubano de Estabilizacion del Azucar, c/o Southwestern Sugar & Molasses Company, or order on payment of freight at the rate of as per Charter Party. This shipment is carried under and pursuant to the terms of the Charter dated April 17th—1952 at ..... between Transocean Shipping & Trading Company and Instituto Cubano de Estabilizacion del Azucar, as Charterer, and all the terms whatsoever of the said Charter except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in the shipment.

In Witness Whereof, the Master has signed Three Bills of Lading of this tenor and date, one of which being accomplished, the others will be void.

Dated at Vita, Gibara, Cuba, this 14th day of May, 1952.

Weight, quantity, quality and condition unknown to me.

All on board to be delivered.

K. Saba, Master.

[There were three sets of bills of lading, all in the same form, each set for a specified quantity of the full cargo shipped. R. 86-88.]

## Endorsement of Judge Murphy Sustaining the Exceptions and Dismissing the Amended Libel

(Record, page 77.)

May 2, 1956

Exceptions sustained. Libel dismissed. Settle order.

THOMAS F. MURPHY,
U. S. D. J.

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## United States Arbitration Act, 9 USC §§2, 4 and 8

"§ 2. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

"§4. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. * * * If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within

admiralty jurisdiction, the court shall hear and determine such issue. * * * "

"§ 8. If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

## Harter Act, 46 USC §190

"§ 190. It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

## Carriage of Goods by Sea Act, 46 USC §§1300, 1301(a), (b); 1303(6); 1305

"§ 1300.

"Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter and section 25 of Title 49. Apr. 16, 1936, c. 229, 49 Stat. 1207.

"§ 1301.

"When used in this chapter and section 25 of Title 49—

"(a) The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.

"(b) The term 'contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

• • •

"§ 1303.

• • •

"(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

• • •

"(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the

carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

"Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

"The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

"In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

• • •

"§ 1305.

"A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter and section 25 of Title 49, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

*Carriage of Goods by Sea Act, 46 USC §§ 1300, 1301(a), (b); 1303(6); 1305*

"The provisions of this chapter and section 25 of Title 49 shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter and section 25 of Title 49. Nothing in this chapter and section 25 of Title 49 shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average. Apr. 16, 1936. c. 229, § 5, 49 Stat. 1211."

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OCT 25 1957
JOHN T. FEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 505

INSTITUTO CUBANO DE ESTABILIZACION DEL AZUCAR,

*Petitioner,*

*v.*

T/V "GOLDEN WEST";
SKIBS A/S "GOLDEN WEST",

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT SKIBS A/S "GOLDEN WEST" IN OPPOSITION

DUDLEY C. SMITH,
*Counsel for Respondent,*
116 John Street,
New York 38, N. Y.

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STATUTE:

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 505

INSTITUTO CUBANO DE ESTABILIZACION DEL AZUCAR,

*Petitioner,*

*v.*

T/V "GOLDEN WEST"; SKIBS A/S "GOLDEN WEST",

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT SKIBS A/S "GOLDEN WEST" IN OPPOSITION

### Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a) is reported in 246 Fed. 2d 802, and in 1957 AMC. 1481. The opinion of the United States District Court for the Southern District of New York is reported in 128 Fed. Supp. 754, and in 1956 AMC. 704.

### Statutes Involved

Petitioner refers (Pet. p. 3) to the Harter Act, and prints 46 USC. Sec. 190 at page 17a of its appendix. The Harter Act is in no way involved in this case in which there

was a shipment from a foreign to a United States port, governed exclusively by the Carriage of Goods by Sea Act, 46 USC. sec. 1300 (Pet. App. 18a).

## Petitioner's Appendix

Petitioner has not printed the libel which was the subject of this litigation and which was dismissed by the courts below. It does print (Pet. App. 14a) an "Arbitration Clause" which was attached to the libel, without stating, however, that this clause is contained in a charter made between petitioner and Transocean Shipping & Trading Company, to which charter this respondent was not a party. The said charter was not put in evidence by petitioner.

## Questions Presented

1. Whether a shipowner can be judicially compelled to arbitrate a claim for cargo damage although he had made no contract or agreement, by charter or otherwise, to arbitrate with anyone.

2. Whether a clause in a sub-charter, incorporated into a bill of lading, providing that disputes between the *sub-charterer* and a shipper should be arbitrated, can be turned into an agreement that the *shipowner* will arbitrate with the shipper, although there was no contractual relation between the sub-charterer and the shipowner.

3. Whether a shipper, whose only right against a shipowner is based upon bills of lading for the carriage of cargo in foreign trade to a United States port, can claim exemption from the one-year time limitation to bring suit contained in the Carriage of Goods by Sea Act (46 USC. sec. 1303 (6); Pet. App. 19a).

## Statement

In the courts below, as here, petitioner has avoided setting down a clear and complete statement of the facts. The facts as found by Judge Bicks in the District Court (Pet. App. 8a) are as follows:

1. On May 24, 1949, respondent chartered its tank vessel "Golden West" to Overseas Commodex Corporation, and this charter was renewed on May 16, 1951, for a period of three years, one and one-half months. By this charter the whole capacity of the vessel was chartered to Overseas Commodex Corporation and the master was to sign bills of lading as directed by the charterer.

2. Apparently Overseas Commodex Corporation subchartered the vessel to Transocean Shipping & Trading Company, for on April 17, 1952, while the vessel was still under long-term charter to Commodex, this petitioner made a charter with Transocean Shipping & Trading Co. for a voyage of the vessel from Cuban to United States ports.

3. Respondent at no time entered into any charter with petitioner, and had no relationship of any kind with Transocean Shipping & Trading Company. The insinuations throughout petitioner's brief, particularly at page 7, that Transocean was a "secret agent" of the Shipowner are entirely without justification in the record or the findings of the District Court.

4. On December 8, 1953, some eighteen months after the completion of the voyage on which the alleged loss occurred, petitioner filed a libel in the United States District Court for the Southern District of New York against the vessel and respondent, alleging short delivery of cargo at Albany in May, 1952. The only specific demand in the libel was for arbitration under a clause in the charter the libelant (petitioner) had made with Transocean Shipping & Trading Company.

5. In March 1955, Judge BICKS denied, upon argument and written briefs, petitioner's motion under Section 8 of the United States Arbitration Act to compel respondent to submit to arbitration for the reasons set out in his opinion (Pet. App. 8a). He held that the libel could not be dismissed because the prayer in the libel for "other and further relief" could support a claim against the vessel owner for cargo loss or damage.

6. Following this decision, for the first time libelant (petitioner) asserted a right to recover its alleged loss from respondent under the law relating to ocean carriers. Since it appeared on the face of the libel that it was filed more than one year after the discharge of the cargo, at which time the claim arose, respondent filed exceptions on the ground that it was discharged from all liability under Section 3(6) of the Carriage of Goods by Sea Act, and in May 1956 Judge MURPHY sustained the exceptions and dismissed the libel.

7. The decisions of both District Judges were unanimously affirmed by the Court of Appeals.

It is evident from the above that when this alleged claim arose there were various legal remedies open to petitioner: it could have brought suit against Transocean Shipping & Trading Company on the contract of carriage evidenced by the charter; it could have claimed the right of arbitration against Transocean Shipping & Trading Company with whom it alleged that it made a charter for the transport of its cargo, which charter contained an arbitration clause; it could have brought suit under the bills of lading, within one year after the discharge, against Transocean Shipping & Trading Company, and against the Golden West and the respondent.

Instead of asserting these rights, libelant allowed the matter to rest for eighteen months and first asserted its claim on December 8, 1953. For some unexplained reason it did not claim under its charter against Transocean. As

against respondent, it was forced to contend that its agreement to arbitrate with Transocean constituted an agreement to arbitrate by respondent, or that the law applicable to suits under bills of lading was not to be applied to its particular claim. Naturally, it failed to persuade the courts below that these positions were tenable.

## Argument

Petitioner's first reason for the allowance of a writ (Pet. p. 9) is that the denial of arbitration below is "irreconcilable with the applicable decisions of this Court".

Neither this Court, nor any other court so far as we can determine, has ever been asked to compel a party to arbitrate where he had made no agreement for arbitration. Petitioner does not, and can not, cite any decision of this Court, or of any lower court, holding a ship-owner bound to arbitrate a claim for cargo damage because there was an arbitration clause in a charter to which the ship-owner was not a party.

No such question was involved in *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263, cited by petitioner (Pet. p. 10), for in that case there was, as this Court said at page 269, "no question that the controversy between the petitioner and the respondent was within the arbitration clause of *the booking contract*"—*a contract made between petitioner* and respondent.

Throughout its argument petitioner attempts to make Transocean Shipping & Trading Co., which it refers to as "the shipping company", a mere agent of respondent, and treats the act of the master in signing bills of lading as if it amounted to an assumption by the ship-owner of the obligations of the charter, relieving the actual charterer of all responsibility thereunder. At page 11 petitioner says that respondent adopted the charter for "respondent's per-

formance", and "accepted the promised fruits" of the charter as the "price of performing it". Nothing could be further from the fact.

The purpose of issuing these order bills of lading was to acknowledge receipt of the cargo on board the vessel, and to bind the vessel and her owner to the proper carriage and delivery of that cargo, thereby providing negotiable shipping documents for commercial use. But by this customary procedure the ship-owner did not take over the performance of the charter made by Transocean Shipping & Trading Co. That charter remained a separate document binding on the parties thereto. The only "fruits" the ship owner obtained were his payments of hire from Overseas Commodex Corp. under the long-term time charter, arranged for years prior to the voyage in question. The fruits of that voyage went to Transocean in the payment of freight.

The charter entered into between Transocean Shipping & Trading Co. and petitioner (which petitioner failed to put in evidence) presumably contained provisions for commencement and termination, for the loading, stowage, carriage and discharge of cargo, for payment of freight, lay days, etc. Disputes under all these provisions were subject to arbitration, and the terms were incorporated into the bills of lading so that any holder thereof (these were order bills) would have notice of and be bound by or could take advantage of such terms (*Son Shipping Co. Inc.* v. *DeFosse & Tanghe*, 199 Fed. 2d 687). Instead of taking advantage of its right to arbitrate its claim for cargo loss and damage against Transocean, petitioner contends that because Transocean agreed to arbitrate, and such agreements was incorporated in the bills of lading, the ship-owner must be held to have agreed to arbitration.

The bills of lading incorporate the terms of the charter of April 17, 1952, made by petitioner with Transocean Shipping & Trading Co. One of the terms so incorporated in

the bills of lading was for arbitration of disputes under that charter, that is, disputes between the *chartered owner, Transocean,* and the charterer petitioner.

What the courts below refused to do was to translate or rewrite this provision into an agreement that disputes between the shipowner and the petitioner should be arbitrated.

The Court of Appeals said on this point (Pet. App. 5a), 246 F. 2d 802, 804—

> "If the libelant desired to submit its claims of shortage to arbitration, it should have served its demand upon Transocean, with whom it had its arbitration agreement. The charter party incorporated into the contract for carriage evidenced by the bills of lading so provided and cannot be reasonably read to provide otherwise".

This decision is not "irreconcilable" with any decision of this or any other Court.

At page 10 the petition suggests that the decision below will impair many outstanding contracts. To set up its argument, reference is made to cases of assignments of contracts, or where "an immediate promisor has assumed all the obligations of the original promisor" (p. 13). This is a complete distortion of the ordinary situation of the issuance of bills of lading for the carriage of cargo arranged for under a subcharter.

The decision below does not impair any contract. To the contrary, it affirms the right of the shipper to arbitrate with the party with whom it contracted for arbitration, that is, the charterer. It affirms the right of a ship-owner to contract for the use of his vessel under long-term time charter in foreign trade, without being bound by contractual obligations to which he did not agree and of which he had no knowledge. To hold as petitioner demands would be for

the court to impair the ship-owner's contract and place an impossible burden on the chartering of vessels.

One of the difficulties for the ship-owner which would be created by the decision sought here by petitioner is indicated by the Court of Appeals opinion in *Son Shipping Co.* v. *DeFosse & Tanghe*, 199 Fed. 2d 687. In that case the ship-owner had contracted for arbitration (*contra* this case, as pointed out by the decision below, Pet. App. 5a). The Court of Appeals in the Son Shipping Case held that the one-year time limit to sue did not apply to arbitration agreements and at the end of its opinion at page 689 said:

> "We are aware that the time within which arbitration may be demanded may be of great importance to the parties who have by contract agreed to have their differences so determined, especially to a ship-owner, but unless they see fit to condition their agreement by an express time limitation, a demand within a reasonable time, as here, is not barred."

Certainly a ship owner would have no possibility of protecting himself by an express time limitation, if he were held bound by arbitration agreements to which he is not a party and of which he has no knowledge.

The petition at page 13 says that the decision below "vexes the future administration of state arbitration laws in both the state and the Federal courts". Again, no case in a state court holding a party bound to arbitrate who had not made an agreement for arbitration is cited. The argument appears to be that a state court might make such a decision, in which case it would find itself in opposition to the holding in this case. In the very unlikely event of a state court considering such a decision as petitioner indicates, we suggest that it would not vex but would prove most advantageous if such court were bound by the present decision.

When it is understood that the agreement incorporated in the bills of lading in this case was an agreement by a separate entity, Transocean Shipping & Trading Co., to arbitrate, and was not an agreement by the ship-owner respondent to arbitrate, all the arguments of the petition eliminate themselves, and the decision below is the only possible one consistent with both Federal and State Arbitration Statutes.

The point is clearly stated in the District Court's opinion (Pet. App. 10a), in distinguishing *Son Shipping Co.* v. *DeFosse & Tanghe*, 199 Fed. 2d 687, on which case petitioner relied in the courts below. The District Court said—

> "That case is not authority for libelant's position. There the owner had agreed *in the charter party incorporated in the bill of lading* to arbitrate all disputes arising therefrom; here the owner was not a party to the charter agreement referred to in the bills of lading and indeed may well have been in complete ignorance thereof except through the reference in the bills of lading."

Having argued up to this point that the bills of lading bound the ship-owner to arbitration, the petitioner at page 15 now argues that after all the bills of lading were not controlling documents, and therefore its claim was not subject to the time limitation in the Carriage Of Goods By Sea Act.

Petitioner cites cases holding that the Harter Act did not apply to bills of lading issued by a charterer to a shipper where such bills were intended to be a mere receipt for the shipment, and the terms of the charter for the whole capacity of the vessel were intended to govern the relations between charterer and shipper. Petitioner refers to commentators who have concluded that in such situations the Carriage Of Goods By Sea Act would not apply.

These cases and comments have no bearing upon the situation in this case. The bills of lading in this case were

not mere receipts, but were the only evidence of contracts of carriage made by respondent. The only rights which petitioner has against respondent are based upon these bills of lading. The terms of the charter of April 17, 1952 are involved in this case as against respondent only as they are incorporated in and made part of the bills of lading. These were order bills and could have been sold and transferred making respondent liable to three different holders. To these contracts the Act applies by its own provisions, and under the Act the carrier and the ship are discharged from all liability. The Carriage Of Goods By Sea act (46 USC, Sec. 1300) provides—

> "Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have affect subject to this chapter . . . ".

And Section 1303 (6) provides in part—

> "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

The point here made by petitioner was argued upon written briefs before the District Court, and was dismissed without opinion. The Court of Appeals said (Pet. App. 6a), "We see no merit whatever to this contention".

## CONCLUSION

**It is respectfully submitted that the petition herein should be denied.**

DUDLEY C. SMITH,
*Counsel for Respondent.*

October 23, 1957.

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# Supreme Court of the United States

October Term, 1957

No. 505

INSTITUTO CUBANO DE ESTABILIZACION DEL AZUCAR,

*Petitioner,*

vs.

T/V GOLDEN WEST; SKIBS A/S GOLDEN WEST,

*Respondent.*

## REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN C. CRAWLEY,
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# Supreme Court of the United States

**October Term, 1957**

**No. 505**

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INSTITUTO CUBANO DE ESTABILIZACION DEL AZUCAR,

*Petitioner,*

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T/V GOLDEN WEST; SKIBS A/S GOLDEN WEST,

*Respondent.*

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## PETITIONER'S REPLY

Grossly mistaken about the simple facts of *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263, with which the decision below conflicts, respondent is also confused about the legal significance of the conceded facts on which the courts below avowedly based their denial of arbitration in this case.

Contrary to the assertions made on page 5 of respondent's brief, this court precisely stated in the *Marine Transit* case, 284 U. S. at page 268, that the provision for arbitration was contained in a form of charterparty incorporated by reference into the "booking contract" executed by the shipowner and the shipper. Because the provisions of the extrinsic, unexecuted form of charterparty, including its provision for arbitration, became an integral part of the booking contract when incorporated therein by reference, the careful author of this court's opinion, after pointing out how the integration had been effected, made no distinction btween the two documents.

The substantial identity between the facts of that case and the facts of this case is amply disclosed by the opinions

below, whose recitals are curiously obscured but in no respect challenged by respondent. Thus:

1. Respondent accusingly concedes on page 2 of its brief that the shipping company's voyage charterparty with petitioner contained the arbitration provision which is quoted in part by the Court of Appeals (petition, p. 2a), and is fully set out on page 14a of the petition.

2. Manifestly respondent's bills of lading, from which the Court of Appeals quoted (petition, p. 2a) and a specimen of which is copied in full on page 15a of the petition, incorporated by reference all the terms of the shipping company's charterparty with petitioner, including the arbitration provision.

3. Plainly it was recognized by the courts below that both respondent and its vessel (not claimed to have been demised to Commodex, the asserted "long-term charterer," or to anybody else) were bound as of course by the bills of lading issued to petitioner by respondent's shipmaster (*The Themis*, 2 Cir., 275 F. 254 at 262; *The Capitaine Faure*, 2 Cir., 10 F. 2d 950, 963; Judge Bick's memorandum on reargument, petition, p. 11a; Judge Waterman's opinion, petition, p. 4a).

Arbitration was denied solely on the ground that respondent was not originally a party to the charterparty by all of whose provisions it expressly agreed to be bound (D. C., petition, 11a; C. A. 4a).

Despite respondent's ill-advised assertions on the subject, the decisions below are contrary to the decision in the *Marine Transit* case, *supra*, 284 U. S. 263, and to the principles repeatedly recognized by the courts of New York in the decisions cited at the top of page 12 of the petition.

In view of the simplicity of the undisputed facts and the clarity of the controlling law, the summary reversal of the judgments below, with an order for the direction of arbitration, would seem to be warranted.

Petitioner has anticipated, on pages 15-17 of the petition, respondent's comments regarding the application of the Carriage of Goods by Sea Act to bills of lading issued by a private carrier to the contracting shipper where the bills have not been negotiated or transferred.

**It is respectfully submitted that the writ should be granted.**

October 25, 1957.

JOHN C. CRAWLEY,
*Counsel for Petitioner.*